

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:

ROBERT ALLAN MOSTER, and
DENISE FRANCES MOSTER,

Debtors.

JUDGEMENT ENTERED ON MAR 05 1990

Case No. C-B-89-30521
Chapter 11, U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC

FILED

MAR 05 1990

WARREN L. TABLOSK, CLERK
BY: [Signature]
Deputy Clerk

ORDER GRANTING DEBTORS' MOTION FOR 11 U.S.C. § 362(h)
SANCTIONS AGAINST STATE OF OHIO, DEPARTMENT OF TAXATION

This matter is before the court on the motion of Robert A. Moster and Denise F. Moster ("debtors") for an award of actual and punitive damages against the State of Ohio Department of Taxation ("ODT") and its response to that motion. After hearing the evidence and arguments by both parties and reviewing all relevant authority, it is the conclusion of this court that the acts of ODT against the debtors were willful violations of 11 U.S.C. § 362. Consequently, the debtors' motion for sanctions should be granted.

Facts

The material facts in this case are not disputed by the parties:

On May 8, 1989, the debtors filed a petition under Chapter 13 of the Bankruptcy Code and listed ODT as a creditor on the schedules of indebtedness attached to that petition. Sometime shortly thereafter, ODT received notice of the debtors' filing. Because ODT had no record of any tax liability owed by the debtors at that time, such notice was disregarded. On or about August 30, 1989, after the debtors filed their late Ohio tax

returns, ODT noted a tax deficiency of \$161.75 and sent a request for payment of this unpaid amount to the debtors.

The debtors informed their attorney of this act by ODT, and he sent a letter to ODT, once again notifying it of the debtors' pending bankruptcy case. Nevertheless, on November 13, 1989, ODT sent a document to the debtors entitled "Income Tax Assessment," which again requested the debtors to make payment. This Tax Assessment prompted still another letter from the debtors' attorney advising ODT of the bankruptcy case, yet on or about November 27, 1989, ODT sent the debtors a second Tax Assessment. Thereafter, the mailings by ODT ceased, and the current motion was filed on January 16, 1990.

Discussion

A. Jurisdiction

At the outset, ODT has contested this court's jurisdiction to award damages against it in favor of the debtors. ODT asserts that a bankruptcy court may not award damages for violation of the automatic stay against a state that has filed no proof of claim in the bankruptcy case, citing Hoffman v. Connecticut Dept. of Income Maintenance, ____ U.S. ____, 109 S. Ct. 2818 (1989). ODT did, in fact, file a proof of claim in this case, but it was filed subsequent to the bar date. Thus, ODT's assertion of lack of jurisdiction is based on the theory that ODT's late filed proof of claim should be treated as if one had never been filed, and under the Supreme Court's ruling in

Hoffman, the debtors' motion must be denied. Such an argument is without merit.

The Supreme Court's holding in Hoffman v. Connecticut is simply not applicable to the facts of this case. In Hoffman, it was a Chapter 7 trustee who brought suit against the state of Connecticut for turnover of certain funds and to recover funds paid to the state by a debtor in an alleged preferential transfer. Since Connecticut had not filed a proof of claim, the Court found that the state's Eleventh Amendment immunity would not allow such a suit. Id., at 2824.

The turnover and preference action prohibited in Hoffman can be readily distinguished from the present motion for sanctions against ODT. A turnover or preference action has as its purpose the disgorgement from a state monies already paid to it. An award under § 362(h), on the other hand, serves to restore a debtor (or his estate) who has been damaged by a state's intentional wrongful conduct in violation of the stay. To a lesser extent, § 362(h) serves to punish the state for its wrongful actions as well.

To hold that § 362(h) does not apply to a state unless it has filed a proof of claim would be to undermine one of the Code's fundamental protections for debtors. States would be free to act with impunity in the face of the stay's protection and work to thwart a debtor's fresh start. Such a state of affairs cannot be allowed to exist.

Moreover, unlike the state of Connecticut in Hoffman, ODT has filed a proof of claim. The fact that such claim was filed late does not deprive this court of jurisdiction. Section 502 of the Code clearly provides that

[a] claim or interest, proof of which is filed under section 501 of this title is deemed allowed, unless a party in interest...objects.

11 U.S.C. § 502(a). Once a proof of claim has been filed, court action is required before the claim is disallowed. 11 U.S.C. § 502(b). No such court action has yet occurred with regard to ODT's claim, and the claim therefore still serves as a basis for jurisdiction over ODT. Finally, it seems unreasonable that ODT's own request to have its claim disallowed should overcome the fact that it initially consented to the court's jurisdiction by filing its claim.

B. Section 362(b)(9) is Inapplicable

ODT argues that, even if this court has jurisdiction over this matter, its acts of sending notices of "Income Tax Assessment" to the debtor are exceptions from the automatic stay pursuant to 11 U.S.C. § 362(b)(9). The court disagrees.

All of the notices sent to the debtors by ODT are clearly nothing less than demands for payment. The initial notice, received by the debtors on or about August 30, 1989, provided that the debtors should "return the payment card along with your payment for the amount due within 20 days" with the added warning that "[f]ailure to pay the amount due will result in the issuance

of an assessment."¹ The two subsequent "Income Tax Assessments" issued by ODT in November provided only that the debtors should pay the amount due and even included remittance envelopes. Subsection (a)(6) of 11 U.S.C. § 362 clearly prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case," and ODT's demands for payment stand in plain contravention of this prohibition.

ODT has argued that its position is supported by Dept. of Revenue v. H&H Beverage Distributors (In re H&H Beverage Distributors), 850 F.2d 165 (3rd Cir. 1988), cert. denied, ____ U.S. ____, 109 S. Ct. 560 (1989). However, that case simply does not apply to the present facts. The notice sent by the state of Pennsylvania in H&H Beverage is easily distinguished from the assessments sent by ODT. The Pennsylvania notice merely made the

¹ The full text of the notice provides:

Full payment of the tax due amount shown on your Ohio Income Tax Return has not been received or was not received on a timely basis. Unpaid, partially paid, or late paid taxes are subject to a penalty of double the interest charged. Late filed returns, Form IT-1040, (postmarked after April 15) are subject to a penalty which is the greater of \$50 per month up to \$500 or 5% per month up to 50% of the tax due. In all cases, interest will be charged from the date the tax should have been paid until the date of payment.

The amount of penalty and interest that you owe for not filing or paying on a timely basis is shown on the enclosed Payment Card. Please note that if you obtained an extension for filing your return, the penalty was applied because the return was filed beyond the extension date. If the extension was not attached to your return, please forward copies for our review.

Please return the Payment Card along with your payment for the amount due within 20 days. Also, please write your Social Security Number on your check or money order. Failure to pay the amount due will result in the issuance of an assessment.

debtor aware of the law, while ODT's assessments do nothing but demand payment. See, Id., at 166. Consequently, ODT does not qualify for the exception of 11 U.S.C. § 362(b)(9).

C. Willful Violation

Section 362(h) only imposes sanctions for a "willful" violation of the stay. Courts have generally interpreted "willful" in the § 362(h) context as meaning "intentional or deliberate" conduct. See Budget Serv. Co. v. Better Homes of Virginia, 804 F.2d 289, 292 (4th Cir. 1986); In re Tel-A-Communications Consultants, Inc., 50 B.R. 250, 254 (Bkrtcy. D. Conn. 1985). ODT's repeated demands for payment made after it had been notified at least three times of the pending bankruptcy case easily meet this standard.

D. Damages

Section 362(h) entitles a debtor to actual damages, including costs and attorneys' fees, and, in some instances, punitive damages. This case is not one in which punitive damages are warranted. At the hearing, however, the debtors put forth evidence that ODT's conduct had caused them to miss several hours of work, to incur mileage expenses to retrieve the assessment notices from the post office,² and to experience significant anxiety. While such costs are somewhat difficult to quantify, the

² The assessments were sent by certified mail, return receipt requested and required the debtors to sign for their delivery.

court finds that the actual damages suffered by the debtors in this case were \$500.³

The debtors are also entitled to an award of attorney's fees and costs associated with the present motion. The court will assess such fees and costs upon application by the debtors' counsel.

It is therefore ORDERED that:

1. Robert A. Moster and Denise F. Moster are awarded \$500.00 to be paid by the State of Ohio Department of Taxation as actual damages suffered by violation of 11 U.S.C. § 362; such amount to be paid to the debtors within thirty days of the date of this Order;

2. The debtors' request for punitive damages is denied; and

3. The debtors are entitled to recover from the State of Ohio Department of Taxation reasonable attorney's fees and costs. Counsel for the debtors shall have ten days from the date of this Order to submit (and serve on the Department of Taxation) application for such fees and costs detailing time and expense related to this motion. The Department of Taxation will have ten days thereafter to respond. The court will then assess the amount of such fees and costs due.

³ The testimony of Mr. and Mrs. Moster revealed that their hourly wages were \$8.75/hr and \$5.75/hr respectively and that their travel time related to ODT's actions was approximately three hours on four occasions, and that the distance traveled was approximately 90 miles.

This the 2d day of March, 1990.

George R. Hodges
George R. Hodges
United States Bankruptcy Judge